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APPELLANT'S APPENDIX.

RELEVANT DOCKET ENTRIES.

- July 28, 1954. Information filed.
- July 28, 1954. Motion and Order for Bench Warrant, filed. Bench Warrant exit.
- May 26, 1955. Bond of defendant in \$500. with cash security, filed.
- June 23, 1955. Bench Warrant returned: and filed.
- Aug. 2, 1955. Plea: Not Guilty.
- Aug. 23, 1955. Transcript of plea, filed.
- Sept. 26, 1955. Jury called and sworn.
- Sept. 26, 1955. Trial—witnesses sworn. Defendant moves for judgment of acquittal—motion denied.
- Sept. 26, 1955. Verdict: Guilty. Defendant moves for judgment of acquittal—decision reserved. Defendant moves for a new trial. Bail continued.
- Oct. 3, 1955. Defendant's motion and reasons for judgment of acquittal or for a new trial, filed.
- Oct. 26, 1955. Testimony, filed.
- Oct. 31, 1955. Modification of and additions to defendant's reasons for judgment of Acquittal or in the alternative for a new trial, filed.

Relevant Docket Entries

- Nov. 7, 1955. Argued sur motion for judgment of acquittal or for new trial CAV.
- Jan. 9, 1956. Opinion, Grim, J., denying defendant's motion for judgment of acquittal or for a new trial, filed.
- Jan. 13, 1956. Sentence: Fine \$1,000.00.
- Jan. 13, 1956. Defendant's notice of Appeal filed (1/16/56 copies to U. S. Atty. and Clerk U. S. C. Appeals).
- Jan. 13, 1956. Copy of Statement of Docket Entries to U. S. Court of Appeals filed.
- Jan. 16, 1956. Judgment and Commitment filed.

INFORMATION.

The United States Attorney charges:

That on or about the 10th day of October 1952, at Philadelphia, in the Eastern District of Pennsylvania, within the jurisdiction of this Court, VICTOR CALAMARO being a person liable for the payment of Special Occupational Tax imposed by Title 26 U. S. C., Section 3290, did accept wagers as defined in Title 26 U. S. C., Section 3285, without having previously paid the Special Occupational Tax imposed by Section 3290 due and owing to the United States.

In violation of Title 26 U. S. C., Section 3294 (a).

W. WILSON WHITE,
United States Attorney.

By G. CLINTON FOGWELL, JR.,
*Assistant United States
Attorney.*

Information

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA. } ss.:

G. CLINTON FOGWELL, JR., being duly sworn according to law, deposes and says that he is an Assistant United States Attorney in and for the Eastern District of Pennsylvania, and that the facts set forth in the foregoing Information are true and correct to the best of his knowledge, information and belief.

/s/ G. CLINTON FOGWELL, JR.
Assistant United States Attorney.

Sworn to and subscribed before me this 28th day of July, 1954.

A. S. CLARK,
*Deputy Clerk, United States
District Court, E. D. of Pa.*

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } ss.:

HARRY GEGENHEIMER, being duly sworn according to law, deposes and says that he is a Special Agent, Internal Revenue Service, and that the facts set forth in the foregoing Information are true and correct to the best of his knowledge, information and belief.

(s) HARRY GEGENHEIMER

Sworn to and subscribed before me this 28th day of July, 1954.

A. S. CLARK,
*Deputy Clerk, United States
District Court, E. D. of Pa.*

TESTIMONY.
—

(2)* (Jury duly empaneled and sworn.)

—

(Mr. Henss stated the Government's case to the jury.).

—**GOVERNMENT'S EVIDENCE**
—

Mr. Henss: Officer Benzing.

—

JOHN BENZING, JR., having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Henss:

Q. Where are you employed, Mr. Benzing?

A. Pardon me?

Q. Where are you employed?

A. 29th Police District, 50th and Lancaster.

Q. You are a policeman?

A. That is right.

Q. And how long have you been so employed?

A. Twelve years.

Q. Continuously?

A. Yes, sir.

Q. Have you been connected with any particular squad?

A. Yes. I worked plainclothes at this particular time.

(3) Q. Do you know the defendant in this case?

A. Yes, sir.

Q. Victor Calamaro?

* Figures in parentheses refer to page numbers of typewritten transcript.

A. Yes, sir. I do.

Q. Do you see him in court?

A. Yes. I can.

Q. Who is he?

A. The gentleman sitting there.

Mr. McBride: We concede that he has identified the defendant.

By Mr. Henss:

Q. Did you see the defendant on or about the 10th day of October, 1952?

A. Yes. I did see him.

Q. Where did you see him?

A. We saw him on the highway at 8th and Catharine Streets.

Q. And about what time of the day was it?

A. It was about 1:45 P.M.

Q. Will you state under what circumstances you saw him?

A. Accompanied with Officer Kelly, we were riding in our own private car and we observed the defendant on the highway between 7th and 8th on Catherine walking west. We approached the defendant and we questioned him if he had any number paraphernalia on him.

(4) Mr. McBride: Go ahead.

The Witness: He stated he did.


Mr. McBride: Just a minute. I first move that the "he did" be stricken. I object to any conversation had with the defendant, the corpus delicti not having been proved.

Mr. Henss: I will withdraw that question.

By Mr. Henss:

Q. Did you search the defendant?

A. We did.



Q. What did you find?

A. We confiscated from his person 40 yellow banker slips.

Mr. McBride: Now, just a minute, sir. I would like to cross-examine him as to whether or not he has the slips before he is permitted to give an opinion as to what the slips are, sir. I suppose opinion, as I take it, may be given in such cases, but the papers upon which the opinion is based must be here for the perusal of the Court and the ultimate Judge and the jury. They must be in evidence.

The Court: Go ahead.

CROSS-EXAMINATION

By Mr. McBride:

Q. Do you have anything here that you seized from him?

A. No, we do not.

Mr. McBride: Then I object to his stating an
(5) opinion as to what it was he seized from the defendant.

Mr. Henss: Your Honor, I will explain the absence of the numbers slips—pardon me—of the slips in this case later. I would like to ask him to describe the slips.

Mr. McBride: Well, we object to it, sir; unless the absence of the slips is in some way attributable to the defendant himself, it is the duty of the prosecution to produce them. Neither carelessness nor even though they act with perfectly good and honest intent—if they throw away evidence or if they do not have evidence, unless it is attributable to the defendant himself, it is their duty to produce it; otherwise the defendant would be denied of his Constitutional right of confrontation, the evidence itself that is to be produced against him.

Mr. Henss: Your Honor, we are unable to produce them because of the fact that the slips were confiscated, that they were ordered destroyed, as we shall bring out by a proper witness.

Mr. McBride: Then, may it please the Court, it seems to me they can't face the defendant with his accusers or the evidence against him, and the necessary consequence, if you have to deprive him of his right or that he go free, the choice is easy—he must go free.

(6) The Court: Well, I am going to permit this defendant to describe what it was that he was mentioning a few minutes ago, and I will study this problem as we go along, Mr. McBride, but I will permit him at this point to describe what these papers were.

Mr. McBride: All right. But my record will be protected as to my objection.

The Court: Oh, I am sure it will, but if there is anything you haven't said and you think you should say, go ahead and put it on the record.

Mr. McBride: No. I have protected myself enough I think, at the present.

The Court: I think so, yes.

(DIRECT EXAMINATION CONTINUED)

By Mr. Henss:

Q. Will you describe the papers?

A. We confiscated from the defendant 40 yellow banker slips containing 1200 straight lottery bets and eight sheets of paper containing 600 number straight lottery bets, a total of 1800 number lottery bets.

Q. Mr. Benzing, have you ever been engaged in the enforcement of lottery and book-making laws while you were on the police force?

The Court: Will you talk a little louder. I (7) can hardly hear what you say. I don't believe the jury can.

By Mr. Henss:

Q. Have you ever been engaged in the enforcement of the laws against lottery and book-making?

A. I have.

Q. How long have you been so engaged or how long were you so engaged?

A. Approximately five years all told.

Q. Were you assigned under any particular squad?

A. On this particular arrest I was assigned in plain-clothes by the captain of the district.

Q. Now, you describe some of these slips as banker slips.

Mr. McBride: I object to this, sir. This is expert testimony as to slips and not produced and ultimately to be determined by the judgment of the Court and the jury.

The Court: Yes. But my thought was that this witness would describe in detail exactly what these papers were. Instead of that he is arriving at a certain conclusion which was perhaps drawn from his experience, but we still don't have the description.

By Mr. Henss:

Q. Will you describe exactly what these slips looked like. What writing was on these slips, if any?

A. A yellow banker slip to our knowledge.

(8) The Court: Well, not to your knowledge. Tell us. Give us the size, shape, and then exactly what was on them.

The Witness: The yellow banker slip is about 3 by 7 inches. It is a yellow slip of paper, has quotations, three numbers and a dash, then the amount played on that particular number.

By Mr. Henss:

Q. Well, could you give us an example?

A. Yes. It could be number 234 dash 10 cents, 165 dash 25 cents, and so forth and so on. It could be ten, fifteen, twenty numbers on a particular yellow banker's slip.

By Mr. Henss:

Q. Now, did these slips which you found on the defendant contain numbers similar to those which you have just described?

A. They did.

Mr. McBride: I object to it and move that the answer be stricken.

The Court: What is the objection to it?

Mr. McBride: He has described generally what numbers banker's books and slips do contain, and he doesn't have them here, and all he is saying is that they contain numbers similar.

The Court: Oh, I thought you would make an (9) obvious objection in that it was leading.

Mr. McBride: Oh, yes, we have that, sir. I don't object on that ground. Whether they are similar or not, how they are played, and so forth, are all conclusions and expert opinions, and so forth, and that is the very kind of thing the defendant would be entitled to have Your Honor see and the jury see.

The Court: Well, I think it goes back to the fundamental problem here as to whether or not a person can be tried if the evidence taken in a case of this kind is not in court. I don't remember exactly what the question was. Maybe you had better repeat your question.

Mr. Henss: I am afraid I don't remember.

Mr. McBride: Whether or not they were numbers similar on those things.

The Court: Would you read the question.

(Last question read as follows:

“Q. Now, did these slips which you found on the defendant contain numbers similar to those which you have just described?”)

The Court: In view of the waiver of the leading nature of the question, I will overrule the objection.

By Mr. Henss:

Q. Would you answer, please?

(10) A. Yes, they did.

Q. Do you recall any of the specific numbers on these slips.

A. No. I don't.

The Court: What do you mean when you say you found them on him? Tell us exactly what that means, if that is what you said. I don't know whether that is the expression you used.

The Witness: Yes, sir. We found them on his person. We stopped him and searched him.

The Court: Well, now, what do you mean by that? Turn toward the jury.

The Witness: We stopped the defendant and searched him and his pocket confiscated these yellow banker's slips.

By Mr. Henss:

Q. What conversation, if any, did you have at the time you saw the defendant?

A. We questioned the defendant about the number of lottery slips we found on his person. He stated to us—

Mr. McBride: Just a minute, so that I will have my objection in. I know I am interrupting you a lot—

The Witness: That is all right.

Mr. McBride:—but I object on the ground (11) that the corpus delicti has not been proved, sir.

The Court: Overruled.

The Witness: We questioned the defendant about these number lottery slips and he stated to us that he had been picking up these numbers for about three months and receives \$40 a week.

Mr. Henss: Cross-examine.

CROSS-EXAMINATION

By Mr. McBride:

Q. You didn't see him write anything, did you?

A. No, sir.

Q. You didn't see him receive anything from anyone, did you?

A. No, sir.

Q. You didn't see him hand anything to anyone, did you?

A. No, sir.

By The Court:

Q. You say you have been on the police force for twelve years?

A. Yes, sir.

Q. Explain in detail to us what your duties as a policeman have been over these twelve years.

A. For five of those years, Your Honor—four of those years I put in the vice squad. We had a vice squad in Philadelphia at that time.

(12) Q. The first four or five years—

A. Yes, sir.

Q. On the vice squad?

A. Yes, sir.

Q. Now, what did you do on the vice squad?

A. We concentrated on—

Q. Turn toward the jury.

A. We concentrated on men in the number business and fellows in pool-selling and book-making.

Q. What do you mean by that, that you concentrated on it? What did you do?

A. Well, we tried to pick up fellows that were engaged in any type of lottery.

The Court: I don't like to interpose myself into the trial of this case,— I don't think it is the function of the Judge to do it—but it does appear to me that there is a good bit of evidence here that hasn't been developed.

By Mr. Henss:

Q. Approximately how many—

The Court: Wait a minute. Mr. McBride is on cross-examination.

Mr. Henss: Excuse me.

The Court: I didn't mean to interrupt him.

(13) Mr. McBride: No. That is all right, sir.

By Mr. McBride:

Q. These slips were not dated; were they?

A. I don't recall, Mr. McBride.

Q. You, of course, do not know who wrote whatever was on them, do you?

A. No, I do not.

Q. This was October 10, 1952, at 1:45 P.M.

A. Yes, sir.

Mr. McBride: That is all.

REDIRECT EXAMINATION

By Mr. Henss:

Q. Officer Benzing, how many arrests have you made of people engaged in lotteries while you were on the vice squad?

A. Probably eight, nine hundred.

Q. It might be of some help to the jury if you would describe just what a number play is.

A. A number play—there is a man that will meet you or come to your house and he will ask you what number you want to play for that particular day, and there is generally three digits. You can put any wager you like on any particular three digits that you pick out. Some number bankers differ. Some pay four—four hundred, five hundred, six hundred to one. If that particular digit comes out on that particular (14) day, the man that took the wager from you will pay you those odds. The man that takes this wager from you gives you—generally gives you a tissue. He has a book that measures probably 3 by 7 inches, and in that book is a white slip, a yellow slip and a tissue, and it has carbons—in other words, it is a triplicate copy. When you make this wager he will give you a carbon copy. The white slip is for his information, which is kept by the writer, and the yellow slip in the book is the slip that he turns over to the pickup man, which goes to what we call a numbers bank, and he—you have a record of your number, the writer has a record of the number you played, and the bank has a record of the number you played, and at the end of the day if that particular number comes out the banker will give to the writer the amount that is to be paid to you.

The Court: Is there any evidence as to who played it? How does the banker remember who gave him the slips?

The Witness: The banker doesn't remember, Your Honor. The number writer, the writer, the individual, the fellow who writes, he has what we call a code, and

he may take plays off of maybe 200, 300 people during that course of the day, and he has a code up in the right-hand corner of the slip—take, for instance, maybe a “C” code. The banker knows that (15) that “C” Code—that one of his writers by the name of Charlie had a hit. In turn he gives Charlie the money, and in turn Charlie gives the money to the one that played that particular number. The banker doesn’t know the individual who hit that particular day; the writer is the one that knows.

By Mr. Henss: .

Q. How is it determined whether a certain number hit, as you say, for a given day?

A. Well, there is numerous ways. They are taken from the race tracks. They are taken from the United States Treasury reports. Each banker—in one particular day two or three different numbers have been known to come out, because some bankers work on different systems. It has been known that one bank that paid off on, say, 115, and the other bank has paid off on 722. They have a set—sometimes—most of the time it is known if 115 comes out, that is a number for that day, and everybody pays on it, but it has been known that two numbers paid off on that particular day; so there is no specific way of determining how the number really originates.

Q. Well, you say they compute it from—

A. It is only from hearsay. I mean, I—

Q. Now, is it your opinion that these slips which you found on the defendant were numbers slips or banker’s slips?

Mr. McBride: I object to that.

(16) The Court: I think there is a gap in this man’s testimony that hasn’t been filled. For four or five years he was working on this type of thing and we don’t know what type of work he did since that time. Now his testimony as an expert is at the end of the

twelve years. Perhaps you can see what is going through my mind.

By Mr. Henss:

Q. After you had served four or five years, as you said, on the vice squad, where were you then assigned?

A. I was assigned as a patrolman to the 33rd District and then—

Q. What were your duties as a patrolman in the 33rd District?

A. Patrolling my particular sector in the fed. car, police car.

Q. Did you engage in the suppression of lotteries at that time?

A. I did.

Q. Did you make any arrests?

A. I did.

Q. Approximately how many?

A. About 55.

Q. After that where were you assigned?

A. I was assigned as a captain in plainclothes.

(17) Q. For how long?

A. Approximately a year.

Q. And what were your duties?

A. Same duties I had in the vice squad.

Q. And what was that?

A. That was to apprehend number men or men that was engaged in any sort of illegal lottery.

Q. Did you make any arrests?

A. I did.

Q. Approximately how many?

A. Approximately 50 to 75.

Q. And then where were you assigned?

A. I was then assigned to the 29th District, 50th and Lancaster.

Q. And how long have you been assigned there?

A. Approximately three years; two and a half years.

Q. Are you presently assigned there?

A. Yes; I am.

Q. And what are your duties in the 29th District?

A. I am in uniform in a patrol car.

Q. Do you engage in the suppression of number and lottery plays?

A. Not specifically.

Q. Have you made any arrests of numbers writers?

(18) A. Yes; I have.

Q. Approximately how many at that time?

A. Approximately 20.

Q. Now, over the years have you been familiar with the operation of the numbers bank?

A. The numbers bank?

Q. That is right, or the numbers racket or the numbers game.

A. Yes, sir. I am pretty well familiar.

Q. And as a result of your experience have you formed an opinion as to what these slips which you confiscated from the defendant contained, what they were?

A. Yes, sir.

Q. And what were they?

Mr. McBride: That is what I object to.

Mr. Henss: In your opinion.

The Court: I will overrule the objection. In fact, I think it has been answered.

The Witness: Number lottery plays.

Mr. Henss: That is all.

Mr. McBride: That is all.

Mr. Henss: Officer Kelly.

(19) EDWARD L. KELLY, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Henss:

Q. Mr. Kelly, by whom are you employed?

A. By the Philadelphia Police Department.

Q. And how long have you been so employed?

A. Twelve years.

Q. And what has been your experience on the Police Department? Where were you first assigned?

A. In the Police Department?

Q. Well, as—

A. As a patrolman.

Q. As a patrolman. How long were you so assigned?

A. As a patrolman?

Q. Yes.

A. About eight years.

Q. And what were your duties?

A. At that time I was assigned to a red car, patrol car.

Q. Were you engaged in the enforcement of the laws against lottery and book-making?

A. At that time; no.

Q. Did you make any numbers arrest during that time?

A. No, not at that time I didn't.

(20) Q. After that where were you assigned, and what duty were you assigned to?

A. After that I went to the vice squad with Officer Benzing.

Q. And how long were you so engaged?

A. Well, at that time I would say about four months in the vice squad.

Q. And what were your duties?

A. Illegal lottery, book-making, all kinds of vice.

Q. During that time did you make any arrests?

A. I did.

Q. For violation of the lottery and book-making laws?

A. I did.

Q. And approximately how many arrests did you make?

A. I would say 100, 125, approximately.

Q. And to what squad are you now assigned?

A. Inspector Ballard's North Central Division, Plain-clothes.

A. And how long have you been so assigned?

A. It is ten months, January 13 up to the present time.

Q. And what are your duties?

A. Same as—all conditions of vice, lottery—

Q. Pardon me. I didn't hear that.

A. All vice conditions.

Q. Are you engaged in the suppression of numbers writing and pool-selling, book-making?

(21) A. I am.

Q. And during that time how many arrests have you made for such violations?

A. I will say about 300, 300 to 400.

Q. Now, during the time that you have been engaged, you have been employed in the police force, approximately how many arrests in all would you say you have made for the violation of the laws against numbers writing and pool-selling?

A. I would say 300 arrests was made.

Q. And were you with Officer Benzing on October 10, 1952?

A. I was.

Q. Will you tell us what happened?

A. Well, Your Honor, on—

Mr. McBride: Pardon me. So that he can tell a connected story without my jumping up and down, will Your Honor let me now reiterate—

The Court: Surely.

Mr. McBride:—the same objections with respect to every part of his testimony that I made with respect to Officer Benzing's?

The Court: Surely.

Mr. McBride: Very good, sir.

The Court: Go ahead.

The Witness: Your Honor, about 1:45 on (22) October 10, about 2 P.M., we observed the defendant walking west on Catharine, and at 9th and Catharine we approached the defendant and confiscated from his person a quantity of number paraphernalia, and confiscated from his person 40 yellow banker's slips containing 1200 straight lottery bets, and eight sheets of papers containing 600—a total of 1800 straight number lottery bets showing names and initials of various numbers writers. We questioned the defendant and he said he had been picking up these numbers for about three months and gets \$40 per week.

By Mr. Henss:

Q. Would you be able to describe these slips of paper which you confiscated in more detail?

A. Well, the only thing I can do is tell you just like Officer Benzing told you, these yellow slips—it is 3 inches by 7, and three digits, and besides that, next to it is another figure like 10 cents or 5 cents or a quarter. See—

Q. About how many of these rows of digits did you find on one of these slips?

A. Very little. Some has four; some has ten; some has fifteen on each slip.

Q. And it is your opinion that these—did you form an opinion as to what these digits were on these slips of paper which you confiscated?

(23) A. They were, as far as my opinion, numbers play for that day.

Mr. Henss: Cross-examine.

CROSS-EXAMINATION

By Mr. McBride:

Q. Now, you don't remember any particular numbers that might have been on these slips; do you?

A. No, I don't.

Q. Your statement in the answer to the question was based upon your general recollection of what you described as numbers books look like?

A. Yes.

Q. Now, you didn't see him write anything, did you?

A. No, I didn't.

Q. You didn't see him receive those slips from anybody?

A. No, I did not.

Q. You didn't see him give them to anybody?

A. No, I did not.

Q. You just stopped him on the street and upon searching him found them?

A. That is right.

Q. These slips were not dated, were they?

A. Well, I can't remember that now.

Q. As a matter of fact, you can't remember or describe (24) what any particular slip looked like, can you?

A. No, not now, not today; no.

Mr. McBride: That is all.

REDIRECT EXAMINATION

By Mr. Henss:

Q. At the time that you arrested the defendant did you have any question in your mind as to whether these were number slips?

Mr. McBride: That is objected to, sir.

The Court: What was that question exactly?

(Last question read.)

The Court: That objection is sustained. He has already given his opinion on that.

Mr. Henss: That is all.

Mr. Henss: Mr. Capone.

MARIO CAPONE, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Henss:

Q. Where are you employed, Mr. Capone?

A. Quarter Sessions of the Court of Philadelphia.

Q. And what are your duties?

(25) A. They are clerk and custodian of these records.

Q. You are the custodian of the records of the Court?

A. Quarter Sessions Court.

Q. Now, at the Government's request did you bring with you the official records in the case involving Victor Calamaro?

A. I did.

Mr. McBride: May I inspect them?

Mr. Henss: Surely.

Mr. McBride: Is it all right with Your Honor if I do?

The Court: Surely.

By Mr. Henss:

Q. Mr. Capone, what is the court term and number of that case?

A. 1275, October Sessions of 1952.

Q. Do you have the indictment with you?

A. I have.

Q. Would you kindly read it, please.

Mr. McBride: I object to this, sir, first because the corpus delicti has not been proved and therefore any information thereon contained, whether in the form of an admission or not, is inadmissible here, and, secondly, it is not necessary; it is not probative of anything in this case in that one of the counts of the indictment is not such as would (26) make one liable to payment of the Government tax. That is, whatever happened in that case does not necessarily impose liability for a federal tax or have any relevance to it.

The Court: Well, I still don't understand the purpose of this question at all. I don't know whether it is the type of thing that you can explain to me without coming up to the bench and explaining to me.

(Side-bar discussion off the record.)

The Court: The objection is overruled.

Mr. Henss: Would you read the question, please.

(The question was repeated by the reporter, as follows:

"Q. Would you kindly read it, please.")

The Witness: On Bill No. 1275 of October Sessions of 1952, Commonwealth versus Victor Calamaro, residing then at 1736 Ritner Street, Philadelphia, Pennsylvania, charged with setting up an illegal lottery.

On October 29, 1952, at the grand inquest a true bill was had and on May 26, 1953, the defendant, being arraigned in room 443, City Hall, pleaded guilty as charged. He was fined \$200 and costs or 30 days at Philadelphia County Prison by Judge George Griffiths, specially presiding from the 47th Judicial District of Pennsylvania.

(27) By Mr. Henss:

Q. Mr. Capone, will you read the specific charges in detail of the indictment?

Mr. McBride: It is a pretty long one. If you want, I don't see that I would object so far as the reading is concerned, but it might serve the same purpose if it is offered in evidence.

The Court: Well, if it is offered in evidence then Mr. Henss will undoubtedly want to read it to the jury right afterwards.

Mr. McBride: Then we might as well read it, because I persist in the other objection that I made before Your Honor. Then I will say nothing further, sir, and I understand you do offer it in evidence and now ask him to read it?

Mr. Henss: Yes.

Mr. McBride: Now I have objected to his offer in evidence, but since it is in evidence under Your Honor's ruling, I would object to his reading.

The Court: The objection is overruled and the exhibit is admitted.

(Indictment No. 1275, October Sessions, 1952, Commonwealth versus Victor Calamaro, was marked Government's Exhibit No. 1 in evidence.)

(28) The Court: Now the witness can read it or you can read it, whichever you please.

By Mr. Henss:

Q. Would you read it, please?

A. Yes, sir.

"In the Court of Quarter Sessions of the Peace, of the County of Philadelphia, October Sessions, 1952 County of Philadelphia, ss.;

The Grand Inquest of the Commonwealth of Pennsylvania, inquiring for the County of Philadelphia, upon

their respective oaths and affirmations, do present.
That

Victor Calamaro

late of the said County, yeoman on the tenth day of October in the year of our Lord one thousand nine hundred and fifty-two; at the County aforesaid, and within the jurisdiction of this Court, unlawfully did publicly erect, set up; open, make and draw a certain lottery for moneys, goods, wares and merchandise: contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

And the Grand Inquest aforesaid upon their oaths and affirmations aforesaid, do further present. That the
(29) said

Victor Calamaro

on the day and year aforesaid, at the County aforesaid, and within the jurisdiction of this Court, unlawfully did publicly erect, set up and open a certain lottery for moneys, goods, wares and merchandise: contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

And the Grand Inquest aforesaid, upon their oaths and affirmations aforesaid, do further present. That the
said

Victor Calamaro

on the day and year aforesaid, at the County aforesaid, and within the jurisdiction of this Court, unlawfully did privately erect, set up, open, make and draw in a certain building in the City of Philadelphia aforesaid, a certain lottery for moneys, goods, wares and merchandise: contrary to the form of the Act of the

General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania

And the Grand Inquest aforesaid, upon their oaths and affirmation aforesaid, do further present, That the (30) said

Victor Calamaro

on the day and year aforesaid, at the County aforesaid, and within the jurisdiction of this Court, unlawfully did privately erect, set up and open in a certain building in the City of Philadelphia aforesaid, a certain lottery for moneys, goods, wares and merchandise: contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

And the Grand Inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, That the said

Victor Calamaro

on the day and year aforesaid, at the County aforesaid, and within the jurisdiction of this Court, unlawfully was concerned in the management, conducting and carrying on of a certain lottery for moneys, goods, wares and merchandise, then and there unlawfully and publicly erected, set up and opened and to be drawn: contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

And the Grand Inquest aforesaid, upon their oaths and (31) affirmations aforesaid, do further present, That the said

Victor Calamaro

on the day and year aforesaid, at the County aforesaid, and within the jurisdiction of this Court, unlawfully was concerned in the management conducting and carrying on in a certain building in the City of Philadelphia aforesaid, of a certain lottery for moneys, goods, wares and merchandise, then and there privately erected, set up, opened and to be drawn; contrary to the form of the Act of General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania. And the Grand Inquest aforesaid, upon their oaths and affirmations aforesaid do further present, That the said

Victor Calamaro

on the day and year aforesaid, at the County aforesaid, and within the jurisdiction of this Court, unlawfully did have in his possession with intent to sell, and unlawfully did sell a certain lottery and numbers policy: contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania." (32)

Now, it is signed by Richardson Dilworth, District Attorney of Philadelphia, and from there on there is a line which strikes out the reading of that bill of indictment.

Q. That is not necessary. Do you have the plea?

A. Now, wait, I am not finished yet. In the rear of the bill of indictment it reads: the witness, Commonwealth witnesses: Patrolman Kelly No. 2892; Patrolman Benzing, No. 4175, 33rd Police District; bail was set in the sum of \$300 by Magistrate Coyle; and the bailee was Peerless Casualty Company from 11 North Juniper Street, Philadelphia, Pennsylvania.

On May 26, 1953, the defendant paid the fine imposed by Judge Griffith in the amount of \$225.13.

Mr. Henss: That is all. Cross-examine.

Mr. McBride: No questions.

Mr. Henss: Mr. Tursi.

JOSEPH TURSI, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Henss:

Q. By whom are you employed, Mr. Tursi?

(33) A. Police Department, Philadelphia.

Q. And what position do you hold?

A. Police clerk.

Q. And what are your duties as a police clerk?

A. Oh, I hold the evidence until it is ready for court.

Q. Do you have any other duties concerning the evidence?

A. No, that is the only one concerning the evidence.

Q. And at the Government's request did you bring with you the records concerning the arrest of Victor Calamaro together with any evidence which you might have in your possession—

A. I did.

Q. —in that case?

A. I did.

Q. Did you bring the evidence?

A. No, sir. I haven't.

Q. Why not?

A. Well, the only evidence I have here is a confiscation, a slip of confiscation by the court.

Mr. McBride: I didn't hear your statement. Could you raise your voice and repeat what you said?

The Witness: The only evidence I have here is a slip containing notes that the banker's slips was confiscated by the court.

Mr. McBride: I move that that be stricken, sir, (34) both because of the characterization of the slips, which would be no part of the making of any such record, and as to the action of any court, that doesn't prove a court record that way.

The Court: Well, I think your second point is well taken. The record has to speak for itself. This man can't interpret the record.

Mr. Henss: Could I see the record?
Would you mark this.

(Police Department record was marked Government's Exhibit No. 2 for identification.)

By Mr. Henss:

Q. Mr. Tursi, I show you G-2. Can you show me what it is?

Mr. McBride: Which one is that?

Mr. Henss: That is the white slip.

Mr. McBride: And you are asking him what it is?

Mr. Henss: Yes.

The Witness: Yes. I have no knowledge what G-2 would mean on this particular slip, unless it was offered in evidence in some other case.

By Mr. Henss:

Q. Well, what is the white paper itself?

A. Oh, it is a form that we use in the Police Department (35), noting the disposition of a certain case. That is for our files only.

Q. Is it in the regular course of your business to keep such forms?

A. Yes, sir. It is.

Q. By the Police Department?

A. Yes, sir.

Q. And that particular form, was that kept by the Police Department regular course of business?

A. Yes, sir.

Q. Would you kindly read that G-2.

Mr. McBride: I would like to cross-examine him.

The Court: Go ahead.

CROSS-EXAMINATION

By Mr. McBride:

Q. Now, not speaking of the form in general, but speaking of that particular paper, have you ever seen it before you came into court?

A. If I presented this particular paper in court?

Q. No. Have you ever seen that particular paper before coming to court here with it?

A. Yes, sir. We make them out.

Q. Now, did you make that one out?

(36) A. I myself hadn't made this one out.

Q. Do you who did?

A. Another clerk in the Chief Clerk's Office.

Q. Who was it?

A. I wouldn't have any knowledge of that.

Q. Do you know when it was made?

A. I wouldn't know that, either.

Q. That is, it might have been made in response to a subpoena for this case?

A. No, sir. Just as soon as we get a disposition on a case these forms are made out.

Q. And by a clerk in the Office of the Commissioner of Police?

A. Chief Clerk's Office.

Q. Chief Clerk's Office. That is, someone comes into your office and tells you something; is that right?

A. They bring back a slip, either the evidence concerned or a disposition slip such as this one.

Q. And then as a result of a slip that someone brings back that white paper is made out by a clerk?

A. For our files.

Q. And then it remains in your files?

A. Until it is called for; yes.

Q. Are you able to tell us that that was the history of (37) this white paper?

A. Yes, sir.

Q. You don't see any court records, do you?

A. No. I don't.

Q. Whether the information that is brought back to you is correct or incorrect you do not know?

A. Well, it is usually signed by a district attorney or someone from the court.

Q. Still no matter who signs it you personally do not know whether the information contained thereon is correct or incorrect, do you?

A. I cannot say so truthfully.

Q. Your answer was no, that you cannot say so?

A. That is right.

Q. Now, do you have anything signed by the district attorney in this case?

A. I do.

Q. You point to the word "Crippin." Who wrote that?

A. Why, I imagine it would be Crippin.

Q. It is correct that you are imagining that?

A. Yes, that is correct.

Q. You don't know that that is—

A. No, I couldn't state as a fact.

Q. Of course not. It has the name "Griffith" there. Who (38) signed that?

A. Supposedly Judge Griffiths.

Q. Supposedly. And who signed Ed Kelly, 2792?

A. That would be the officer.

Q. And "33rd Police District?"

A. The officer.

Q. Isn't it obvious whoever signed them signed them all?

A. Well, to me it is, but I have seen it come through like that that the officers have given us the disposition of the case.

Q. Well, in answer to my question you say it seems to you that the person who wrote "Crippin," "Griffith," "Ed Kelly, 2792," and "33rd"—that the same person wrote them all?

A. I would say so.

Mr. McBride: That is all. I object to it.

By the Court:

Q. Where did you get this paper that is now marked G-2, I believe?

A. Sir, that is handed down to us as the officer comes back to me—

Q. No—where did you get it, that paper itself when you came to court this morning? Where did you get that paper?

A. From our files.

Q. Is that a file that is kept in the regular course of (39) business of the Police Department?

A. Yes, sir.

Q. In the department where you are a clerk?

A. Yes, sir.

The Court: Overruled.

(DIRECT EXAMINATION CONTINUED)

By Mr. Henss:

Q. Will you read G-1.

A. It is a Police Department form. It is a white slip of paper and the first reading on it would be the date, which was 5-26-53.

The Court: Would you talk a little louder. I can hardly hear it.

The Witness: The first thing I have noted on here is the date, which was 5-26-53, in the case of Victor Calamaro versus Commonwealth, arrested by Officer Kelly of the 33rd District, charged with lottery; the case was disposed of, the defendant being found guilty and sentenced to \$200 fine and costs by Judge Griffiths. The following articles held as evidence in the case were confiscated by Assistant District Attorney Crippins. Articles: 40 slips, 8 sheets.

Mr. Henss: That is all. Cross-examine.

Mr. McBride: No questions.

Mr. Henss: You may step down.

(40) Mr. McBride: Can we detach the white one?

Mr. Henss: Mrs. Friel.

ELEANOR H. FRIEL, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Henss:

Q. By whom are you employed?

A. By the Treasury Department in the Office of the Collector of Internal Revenue, 9th and Chestnut.

Q. And what position do you hold?

A. My position is tax account specialist.

Q. And what are your duties?

A. My duties are to analyze and evaluate outstanding accounts.

Mr. McBride: Will you please, Mrs. Friel, keep your voice up a little bit.

The Witness: All right.

By Mr. Henss:

Q. Now, at the Government's request did you search the records to determine if Form 11-C and the special oc-

cupational waging tax have been filed and paid by Victor Calamaro for the year July 1, 1952 to June 30, 1953?

(41) A. Yes, I have examined the records.

Q. And what did you find?

A. There is a return Form 11-C on file in the case of Victor Calamaro, 1736 Ritner Street, Philadelphia, Pennsylvania, for the period from October, 1952, to June 30, 1953.

Q. And what date was that filed?

A. Well, I am afraid that I am not in a position to answer that. It appears on the Director's records on October, 1953, Account No. 40315.

Q. Whom is it signed by? Whom was this Form 11-C signed by?

A. Well, I do not have the return but it is available.

Q. As to the tax did you search your records? Did you search your records as to the special occupational tax?

A. Yes, I did.

Q. What did you find?

A. The records indicate that there was an assessment set up in the amount of \$56.25. That included tax which was prorated, penalty and accrued interest.

Q. And has it been paid?

A. A portion of it was paid.

Q. When?

A. The records indicate payment on July 8, 1954, in the amount of \$28.25.

(42) Q. Is there an amount still outstanding?

A. There is a tax assessment in the amount of \$28 outstanding. That is all.

Mr. Henss: Cross-examine.

CROSS-EXAMINATION

By Mr. McBride:

Q. When was this assessment set up?

A. The assessment was set up in October, 1953.

Q. Was anyone notified of it?

A. Of the assessment being set up?

Q. Yes.

A. Well, I wouldn't be qualified to answer that.

Q. That is, for all you know the alleged taxpayer may not have been notified that the assessment was set up?

A. From my knowledge.

Q. From your knowledge?

A. I would say I—

Q. About this particular case?

A. I wouldn't be qualified to answer that.

Q. May I ask to look at the records from which you testified? This is the only sheet to which you referred, Mrs. Friel?

A. That is correct.

Q. Now, let me ask you about this. You indicated that the (43) amount assessed was in October, 1955. Am I correct on that?

A. No, October, 1953.

Q. October, 1953. What says that the amount assessed was on that date?

A. October, 1953, lists the amount of taxes, \$41.67.

Q. When was this penalty of \$10.42 put on?

A. That was put on at the time the assessment as set up.

Q. That is, you can tell that by just examining this record?

A. Well, I examined the records in the Director's Office.

Q. You did?

A. This is copied directly in the Director's Office.

Q. Oh, you made your paper up for purposes of bringing it to court?

A. That is correct.

Q. This is not a record of the Director's Office, is it?

A. It is a copy of the records of the Director's Office.

Q. And does it contain all the information that is contained in the Director's Office about this account?

A. It contains all the information on our bookkeeping records, indicates the dates that notices were sent to the taxpayer.

Q. Now, it has a column here, "Adjustment of Over-Assessment." What is that column?

A. Well, there has been no over-assessment in this case. (44) We use that as a record column to indicate the dates that notices have been sent out and outstanding balances.

Q. Now, you indicate that as to payment there was a payment of \$28.25, which is more than half of the total amount assessed?

A. That is correct.

Q. And that there is a balance of \$28.

A. Right.

Q. Now, you have the word "incomplete" on here and it disturbs me a little bit, since this is a copy of the Director's records. Does that mean that this copy is incomplete or what does it mean?

A. It doesn't mean that the record is incomplete; it means that the return was not signed by the taxpayer.

Q. I see—that the return itself was incomplete?

A. That is correct.

Q. Now, how do you know that that was the nature of the incompleteness of the return? Did you see the return?

A. Yes, I did.

Q. Do you have it with you?

A. No. I do not.

Mr. McBride: All right. Thank you, Mrs. Friel.

That is all, sir.

Mr. Henss: That is all.

(45) The Court: We had better recess until 2 o'clock.

Mr. Henss: I would just like to complete the case and just offer this in evidence, Your Honor.

The Court: I think I have already ruled, but perhaps not as specifically as I might have. G-1 was admitted and I understand Mr. McBride objected to it.

Mr. McBride: I assumed Your Honor ruled on that.

The Court: Yes, I did.

Mr. McBride: Yes, I acted on that assumption.

The Court: D-2 is received in evidence.

Mr. Henss: Your Honor, could I have permission to have that photostated over the noon hour, so that it may be returned to the City Hall records?

The Court: Maybe it can be returned this afternoon, anyway.

Members of the jury, you will be excused now until 2 o'clock this afternoon. Come back here at 2 o'clock. Don't discuss the case with anyone in the meantime. Come back and take the seats you now occupy. This is Courtroom No. 3.

(Recess at 12:30 o'clock, P.M.)

(46) AFTERNOON SESSION

PRESENT: Counsel as before noted.

Mr. Henss: Your Honor, I believe that completes the Government's case.

GOVERNMENT RESTS

Mr. McBride: May it please the Court, I wonder if you could agree with me, Mr. Henss, on a couple of the dates. I will put the evidence on the record out of the presence of the jury, if Your Honor wishes, but I think it is important that it be on the record in this case. Perhaps we had better see Your Honor a moment at side bar.

Mr. Henss: I have objection to the testimony, Your Honor.

Mr. McBride: You have no objection?

Mr. Henss: I have objection to the testimony.

(Side-bar conference as follows:)

Mr. McBride: I ask to have it noted of record that this statute was declared unconstitutional by a Judge in this Court in the case of United States versus Kahriger, No. 16672, reported at 105 Fed. Sup. 322 on (47) May 6, 1952, that that judgment of unconstitutionality was in effect until reversed by the Supreme Court of the United States in United States versus Kahriger, reported at 345 U.S. at page 22, which was decided on March 9, 1953.

Therefore, the offense charged to have been committed in this case was committed at a time when this Court had held the statute unconstitutional and while that decision was in full force and effect.

Mr. White: Mr. Henss, I would like to say something to the Judge.

If Your Honor pleases, I think there is a conclusion of law in Mr. McBride's statement, namely, that the decision declared the law unconstitutional and was in full force and effect until reversed. I assume that you didn't intend us to stipulate.

Mr. McBride: Oh, no, not to stipulate as to any question of law. I want to get the facts on record so that Your Honor can decide this question, and I believe it also presents a jury question if Your Honor overrules it as a matter of law.

Mr. White: I think the fact that the decision was appealed would be relevant. Do we have that? You can get that from the docket entries.

(48) Mr. McBride: I have no objection to Your Honor taking judicial notice of it but it seems to me that it is not relevant or material, but if it is relevant or material—

The Court: I can take judicial notice.

Mr. McBride: Yes. I have no objection to that at all.

Mr. White: I think this appeal was very, very timely. It generally is when there is an Act of Congress declared unconstitutional.

Mr. McBride: It would appear that the Government did appeal directly to the Supreme Court of the United States under 18 U.S.C. 373(1). No order of supersedeas had been granted. That is, the judgment of the District Court had not been stayed or in any way interfered with or postponed until decision by the Supreme Court on the appeal.

The Court: Was the indictment found before or after the Supreme Court decision?

Mr. McBride: The indictment in this case was found after the Supreme Court's decision but after this man had gone down there, subsequent to the Supreme Court decision, paid \$28 on this account.

It is understood that these facts will be on (49) the record here as a matter of evidence or by reason of judicial notice for the purpose of considering a motion for judgment of acquittal.

I now make such a motion. That is, I move for judgment of acquittal.

The Court: Denied.

Mr. McBride: Now, ~~do~~ you want to hear argument on any of these points?

The Court: No. For present purposes I can't do anything else. If I decided any other way I would foreclose any other Judge in this Court from even considering it.

Mr. McBride: All right; but how about on the evidence, the fact that the evidence isn't here? That applies only to this case.

The Court: Well, you can argue that if you wish.

Mr. White: Judge Clary ruled the other way on that.

Mr. McBride: That is right. He ruled the other way in a case I tried before him sitting without a jury wherein he ruled that the pickup man was not responsible under this statute. He also ruled that the failure to produce the slips themselves was not fatal.

(50) The Court: Well, I will follow his ruling on the second point.

Mr. McBride: And not on the first?

The Court: Well, I think this Court of Appeals, even though it is not our Circuit, decides differently, so I will go along with that.

Mr. McBride: All right. There is no use in arguing it, then?

The Court: No.

Mr. McBride: I make my motion and I rest.

The Court: Yes.

(End of side-bar discussion.)

(Mr. Henss argued the Government's case to the jury.)

(Mr. McBride argued the defendant's case to the jury.)

(During Mr. McBride's argument, the following occurred:

Mr. McBride: Now, the second point. The second point is this, and we put in evidence. You may take it from the Court but I will first state it to you because the Court has indicated that he will take judicial notice of it.

Here is a man, member of the jury, who is (51) charged with not paying a tax on October 10, 1953, and they say that that is a criminal action. This is a Criminal Court and they want to convict him of a crime of not paying this tax on October 10, 1952, and they indicate to you the fact that he made a partial payment late—

Mr. Henss: Mr. McBride. May I see Your Honor at side bar? I think maybe I misunderstood something. May I see you at side bar?

(Side-bar discussion as follows:)

Mr. McBride: The argument I propose to make to the jury to be considered by them on the issue of criminal intent is that this indictment charges that the offense was committed on October 10, 1952; and that in this District His Honor, Judge Welsh, on May 6, 1952, held that this statute was unconstitutional and therefore no duty arose upon any citizen to file or pay any such tax, that that decision stood without stay or hindrance until the Supreme Court on March 9, 1953, reserved it, and that, therefore, they could properly consider that on the issue of whether this defendant in this criminal trial should be or can be subjected by their judgment to a criminal penalty.

The Court: See, that is the whole point of the argument that is coming up and I don't want to (52) decide that here.

Mr. McBride: Well, how does that stop me from arguing it to the jury?

The Court: Well, my ruling is that it is irrelevant at this time.

Mr. McBride: Have you thought that over carefully, Judge?

The Court: As much as I can.

(End of side-bar discussion.)

(Mr. McBride concluded his argument to the jury.)

The Court: Mr. Henss, let me have that photostat and the part that is relevant here.

Mr. McBride: May it please the Court, could I correct the record? I did say formally when I was at side bar that I rested. I did not say formally that I renewed my motion for judgment of acquittal. Would Your Honor accept it as though I had said that then?

The Court: Yes.

Mr. McBride: That is, that Your Honor has before you a motion for acquittal.

The Court: Surely.

(53).

CHARGE OF THE COURT

GHEM, J.:

Members of the jury, you are the sole judges of the weight of the evidence and the credibility of the witnesses who have testified before you and the inferences to be drawn from the evidence. You are not bound to take the testimony of any witness as absolutely true; and should not do so if you are satisfied from all of the facts and circumstances in evidence before you that such witness is mistaken, or for any other reason the testimony is untrue or unreliable.

In determining the weight and credibility of the testimony, or any part thereof, you may and should consider the relation of each witness to the case or to the parties, their interest, if any, in the case or the result of the case; their temperament, feeling or bias, if any has been shown; their demeanor while testifying; their apparent intelligence or means of information concerning the things of which they testified; their situation and ability to know the matters to which they have testified; the reasonableness or unreasonableness of their testimony; and give such weight and credit to the testimony of each witness as under all of the facts and circumstances in evidence you believe it fairly entitled to receive.

(54) The defendant in this case is Victor Calamaro, whom you have seen sitting here in the courtroom. He has been indicted under a statute or an Act of Congress of the United States which in certain sections reads as follows:

“A special tax of \$50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wages for or on behalf of any person so liable.”

Another section is:

"Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery."

Another section states:

"Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable for the payment of the tax, be fined not less than so much and not more than so much."

The amount isn't particularly important to you. That will be for a Court later on to decide in imposing sentence, if you should find that this defendant is guilty (55) in accordance with the way that I am charging you.

The indictment in this case brings the charge against this defendant and it is the foundation upon which the case must be based. The indictment reads as follows:

"That on or about the 10th day of October, 1952, at Philadelphia, in the Eastern District of Pennsylvania, within the jurisdiction of this Court, Victor Calamaro, being a person liable for the payment of Special Occupational Tax imposed by Title 26 U.S.C., Section 3290, did accept wagers as defined in Title 26 U.S.C., Section 3285, without having previously paid the Special Occupational Tax imposed by Section 3290 due and owing to the United States.

"In violation of Title 26 U.S.C.," and so forth.

Mr. Calamaro, the defendant, has pleaded not guilty. A plea of not guilty by a defendant is in legal effect a denial of every essential allegation of the indictment and

puts upon the Government the burden of proving the same to be exclusion of every reasonable doubt and substantially as charged in the indictment.

An indictment is not to be considered by you as evidence against a defendant. An indictment is merely a necessary means of placing a defendant on trial and raises (56) no presumption against him.

A defendant is presumed to be innocent of all the charges against him until he has been proven guilty by the evidence submitted to you. This presumption remains with the defendant until such time in the progress of the case, including your deliberations in the jury room, that you are satisfied of his guilt beyond a reasonable doubt.

A reasonable doubt is what the term implies—a doubt founded upon reason. It does not mean every conceivable kind of doubt. It does not mean a doubt that may be purely imaginary or fanciful, or one that is merely captious or speculative. It means simply an honest doubt that appeals to reason and is founded upon reason. If after considering the evidence in the case you have such a doubt in your mind as would cause you or any other reasonable or prudent man or woman to pause or hesitate before acting in a grave transaction of your own life, then you have such a doubt as the law contemplates is a reasonable doubt.

I will go over the evidence briefly with you. You must remember, though, that you are the sole judges of the facts in the case and that if I should misstate any of the evidence in the case you must consider it as you heard it and not necessarily as I give it to you. Of course, I will do my best to review the evidence exactly as I remember it.

(57) You will remember that there were two city policemen who took the stand here, Officers Benzing and Kelly. As I remember it, they both testified that on October 10, 1952, at about 1:45 o'clock in the afternoon, they met this defendant, Victor Calamaro, and upon searching him found certain slips of paper on him, certain yellow slips of paper, which I think were described as being something like 3

inches by 7 inches. They both testified that from their knowledge of the numbers business, the selling of numbers, as I believe it is sometimes called, in their opinion these slips of paper were what they described as numbers slips. If I did not put that exactly right you must remember it as you heard it and not necessarily as I gave it to you. I am not too familiar with the terms that are applied to this business, but I have done my best to repeat it to you as I believe these witnesses testified.

Officers Benzing and Kelly testified that upon questioning Victor Calamaro he admitted that for several months he had been picking up numbers or numbers slips, or whatever they were, and that he was paid \$40 a week for so doing.

In addition to that, the Government has introduced into the evidence of the case a record from the Court of Quarter Sessions of Philadelphia County. That is a state (58) court which is held up in City Hall. That record indicates that a Victor Calamaro pleaded guilty to a lottery charge. You will remember from the evidence exactly what it was. I don't remember exactly how the charge was written. After his plea of guilty he was sentenced on this charge which was based on an incident which occurred, as I remember it, on October 10, 1952.

The Government then put on the stand Mrs. Friel who testified to the effect that she had looked over the records in the Office of the Bureau of Internal Revenue and that the records indicated that this Special Occupational Tax has not been paid in full. You will remember that the statute said that the tax is \$50. The records indicated that \$28.25 had been paid but that the full \$50 had not been paid, and I believe the records indicate that the tax had been paid in 1954.

Now, along with that I will call to your attention a section of the statute which I already have quoted to you but which I will quote to you again. It says:

"Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable for the payment of the tax, be fined so much and so much."

In other words, if he does these things with- (59) out having paid the tax, he becomes criminally liable under this section of the statute. In other words, if this tax is paid late, as I understand this statute, he can be found guilty under this section of this Act of Congress that I have read to you.

There is an important element in this case that you will have to consider carefully. The Government is charging this defendant with having committed a crime as laid out in the indictment which I have read to you. However, the papers that were described as numbers slips by these policemen have not been produced in court. You will consider that carefully and determine what weight you wish to put upon that element in the case. As I understood the defendant's contention, he argues that because these slips have not been produced in court that you should refuse to believe these witnesses who have testified that they found these slips on this defendant. That will be for you to determine. There was an explanation to the effect that the slips were confiscated by the District Attorney's Office up in City Hall and that that is why the slips were not here; but, nevertheless, they are not here. You will put such weight on that element in the case as you think it deserves.

The defendant, Victor Calamaro, has not testified in the case, as you will remember. The defendant has a (60) right not to testify, and the failure of any defendant to take the witness stand and testify in his own behalf does not create any presumption against him. I charge you that you must not permit that fact to weigh in the slightest degree against the defendant, nor should this fact in any manner enter into your discussions during your deliberations in the jury room.

Your function will be to find this defendant either guilty or not guilty. Your verdict will have to be unanimous.

There may be and probably will be differences among you members of the jury when you first go to the jury room, but whatever differences there are will have to be resolved and your verdict will have to be a unanimous one.

Do counsel have any comments?

Mr. McBride: First, may it please the Court, in stating that I had argued that that affected the credibility of these officers as to whether or not they got slips from him, I should like to correct that, if I may. I was not talking about the untruthfulness of the officers, not saying they did not get slips from his person. I was directing my argument only to the character of the slips, that there were slips. I was talking only of slips, what they were, and not whether they had actually done what they said.

The Court: Very well. I am sorry if I misunderstood your contention. (61)

Mr. McBride: That is quite all right, sir. I was sure it was a complete inadvertence.

The Court: I wanted the jury to understand your contention and I think the jury now understands it.

Mr. McBride: And finally, sir, I ask an exception to Your Honor submitting the case to the jury at all.

The Court: All right.

Mr. Henss: Your Honor, would you clarify to the jury that if they find that the defendant, Victor Calamaro, picked up numbers as he had told it to the policemen, if they believed the policemen's testimony then he was liable to pay the tax under Sections 3290 and 3294 of Title 20, U.S.C.A.

The Court: Mr. Henss, I have read the statute to the jury. I have read the exact words of the statute. I have

gone over the facts. From now on it is the jury's problem, I think.

Mr. Henss: Exception, Your Honor.

The Court: Yes. Of course, I have read the indictment to them, also.

The Deputy Marshal may be sworn.

.(Deputy Marshal George Gehringer, sworn.)

(The jury retired at 3:00 with Government's Exhibit No. 2.)

(62) The Court: Do either of you want the indictment to go to the jury?

Mr. McBride: The indictment in this case?

The Court: Yes.

Mr. McBride: It is a matter of complete indifference to me, Your Honor.

Mr. Henss: It is the same with me, Your Honor.

The Court: Well, then we won't send it to them.

Mr. McBride: I will specifically waive it. If there be a right to have it go out, I will specifically waive it.

The Court: I think it is a matter of discretion with the Judge.

Mr. McBride: As long as you have given them the essential elements of the charge.

Mr. Lilly: Do I understand it is not to go out?

The Court: Not to go out.

(At 3:35 o'clock, P.M. at the request of the jury and after consultation with counsel for both parties, the Court permitted a copy of the information to be given to the jury in the jury room for use during their deliberations.)

(63) (The jury returned at 3:50 P.M.)

(Counsel as heretofore noted.)

The Clerk (Mr. Spann): Members of the jury, have you arrived at your verdict?

The Foreman: We have.

The Clerk: How say you, do you find the defendant, Victor Calamaro, guilty or not guilty as charged in this information?

The Foreman: Guilty.

A. Juror: We find him guilty as charged.

The Clerk: Members of the jury, hearken unto your verdict as the Court hath recorded it. In the issue joined between the United States of America and Victor Calamaro you say you find him guilty in the manner and form as he stands informed against, and so say you all?

Several Jurors: Yes.

The Court: Thank you very much, members of the jury. You will be excused now until 10 o'clock tomorrow morning. Come back to the jury room at that time.

(Jury out at 3:55 o'clock P.M.)

Mr. Henss: Your Honor, could I move for imposition of sentence now?

(64) Mr. McBride: May it please the Court, I renew my motion for a judgment of acquittal or in the alternative for a new trial, and I think the questions are very substantial, and if the motion of the Government were entertained and sentence were imposed, then the only thing would be to go up on appeal, and I think that I would rather see Your Honor review this whole question at leisure.

The Court: I think the wise thing for me to do is to give you an opportunity to file your motions, and so on, and.

argue these matters at length, and then sort of work them together with the arguments in the Kossman cases.

Mr. McBride: I would add that the bail stand up until the judgment of the Court, and, therefore, he is still under bail as of this moment despite the verdict.

The Court: Any objection to that?

Mr. Henss: No.

The Court: Well, the same amount of bail will stand.

OPINION.

(Filed Jan. 9, 1956.)

January 9, 1956

GRIM, J.

Defendant has been convicted of failing to pay the \$50 special gambler's tax imposed yearly by the Internal Revenue Code, 26 U. S. C. A. Sec. 3285 et seq.¹ He has moved for judgment of acquittal or in the alternative for a new trial.

The government called as witnesses two Philadelphia police officers who had had many years of experience in the suppression of vice and much experience in the suppression of numbers gambling. They testified that they arrested defendant on October 10, 1952, and that at this time he had in his pockets 48 sheets of paper which were three inches wide and seven inches long. On these sheets of paper were 1800 notations of numbers, each one of which was a three digit number followed by a dash and another number. The officers described the slips of paper as "banker slips" and testified that from their experience in the numbers gambling business it was their opinion that the numbers on the sheets were notations of lottery bets or wagers, that the three digit numbers in front of the dash were numbers which had been played and that the number following the dash showed the amount of money which had been played on the number which preceded the dash.

1. The information charges: "That, on or about the 10th day of October, 1952, at Philadelphia, Victor Calamaro—being a person liable for the payment of Special Occupational Tax imposed by Title 26 U. S. C., Sec. 3290, did accept wagers as defined in Title 26 U. S. C., Sec. 3285, without having previously paid the Special Occupational Tax imposed by Sec. 3290 due and owing to the United States."

Defendant admitted to the officers at the time of his arrest that he had been picking up "numbers" for a period of three months and that for this work he had been paid \$40 a week.

The evidence also showed that as a result of the evidence obtained at the time of the arrest on October 10, 1952, defendant was indicted in the Court of Quarter Sessions of Philadelphia County and charged with setting up an illegal lottery. The evidence showed also that defendant pleaded guilty to this charge and was sentenced thereon.

The Revenue Code provides: (Sec. 3285)

"(a) Wagers. There shall be imposed on wagers . . . an excise tax equal to 10 per centum of the amount thereof . . .

"(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery."

The Code also provides: (Sec. 3290)

"A special tax of \$50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable."

The Code also provides: (Sec. 3294)

"(a) Failure to pay tax. Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall besides being liable to the payment of the tax, be fined not less than \$1,000 and not more than \$5,000."

The numbers gambling business in which defendant was involved was operated by a proprietor or numbers

bank. The proprietor employed numbers writers who made the contacts with the public and who actually sold the numbers and collected the money from the customers. The writers made records of their bets or wagers (the numbers played and the amount of money played thereon) and these records were conveyed to the numbers bank. However, the writers themselves did not bring these records to the numbers bank. This transportation or messenger work was done by other employees of the bank, known as pick-up men. Defendant was one of these pick-up men. The evidence does not show that he himself sold any numbers or handled any money, or that he was a proprietor of the business.

It is clear that the proprietor of the gambling business in which defendant was engaged was liable for a tax of ten per cent on the amount of all the wagers placed with him and that he was liable additionally for the special tax of \$50 a year. It also is clear that the numbers writers were liable for the special tax of \$50 a year. The question here is whether or not defendant, who did not contact the public and who handled no money was "engaged in receiving wagers for or on behalf of" his employer, the numbers bank.

Defendant contends that he was not "engaged in receiving wagers." I disagree with defendant's contention. In my opinion he was just as much engaged in receiving wagers as were the numbers writers. The numbers writers, of course, actually contacted the customers, took their money and assisted more directly in the making of the bets, but they were no more receiving wagers than was defendant, because they were all working not for themselves, but for their principal and it was the principal in fact who was making the wagers. Both the pick-up men and the numbers writers were assisting in the making and receiving of wagers and therefore all of them were "engaged in receiving wagers for or on behalf of" the numbers bank.

In *Sagonias v. United States*, 223 F. 2d 146 (5th Cir. 1955) a pick-up man made the same contention as defendant is now making in the present case. In the *Sagonias* case the United States Court of Appeals for the Fifth Circuit ruled against the contention which defendant is now making. I agree with this decision.

The numbers slips which were found on the present defendant's person at the time of his arrest were seized by the police officers, but they were not produced at the trial of the case. The government explained the failure to produce the slips by showing that they had been delivered to the Philadelphia Court of Quarter Sessions, and that after defendant had pleaded guilty and had been sentenced in that court the slips had been confiscated² by the District Attorney's office. Defendant contends that the slips were the best evidence against him and that because of their absence in the trial of this case he cannot properly be convicted. I disagree with this contention. The government was required to prove only that the slips had existed, that they were numbers slips, and that the defendant had been carrying them. The government had no burden and made no attempt to prove the specific contents of the slips. Consequently, the best evidence rule has no application to the problem presented by the failure to produce the numbers slips in the present case. See IV Wigmore on Evidence, Sec. 1242 (3rd Ed. 1940).³ In *Re Ko-Ed Tavern*, 129 F. 2d 806 810 (3rd Cir. 1942). The failure to produce the slips affected the weight rather than the competency of the testimony of the policemen. The jury chose to believe the

2. There was no evidence that the slips were lost or destroyed. The evidence showed only that they had been "confiscated."

3. Wigmore states (p. 464): "Thus the [best evidence] rule applies only to the *terms of the document*, and not to any *other facts about the documents*. In other words, the rule applies to exclude testimony designed to establish the *terms* of the document, and requires the document's production instead, but does not apply to exclude testimony which concerns the document without aiming to establish its terms."

policemen and the government's explanation of the absence of the slips, as it had a right to do.

On May 6, 1952, the sections of the Internal Revenue Code involved in the present case were held to be unconstitutional by Judge Welsh of this court. *United States v. Kahringer*, 105 F. Supp. 322. The decision of Judge Welsh was reversed and the constitutionality of the statute was upheld by a decision of the United States Supreme Court dated March 9, 1953. *United States v. Kahringer*, 345 U. S. 22. Defendant was arrested on October 10, 1952. The evidence in the case connects him with an offense on that day and with offenses during the period of three months immediately prior thereto. Consequently, all of defendant's gambling activities occurred between the time of Judge Welsh's decision and its reversal by the Supreme Court. Defendant contends that because his alleged violation of the statute occurred after the time the District Court had declared the statute unconstitutional and before the time this decision was reversed on appeal, he cannot be held guilty of a crime in violation of the statute, particularly since he is being tried for a crime which allegedly was committed in the same district in which the statute had been held unconstitutional by a judge of that district. With this contention I do not agree. Judge Welsh's decision was only that of a court of first instance. It was subject to reversal by an appellate court and indeed the decision had been appealed (the notice of appeal was filed on June 6, 1952) prior to the time when defendant engaged in the gambling activities for which he is now claiming immunity because of Judge Welsh's decision. I agree with the statement of the Supreme Court of the State of Iowa in its opinion in the case of *State v. Striggles*, 210 N. W. 137, 49 A. L. R. 1271; the statement being: (p. 1272)

"There is no case cited, nor can we find one on diligent search, holding that the decision of an inferior court, can be relied upon to justify the defendant in

a criminal case in the commission of the act which is alleged to be a crime. We are disposed to hold that when the highest court of jurisdiction passes on any given proposition, all citizens are entitled to rely upon such decision; but we refuse to hold that the decisions of any court below, inferior to the supreme court, are available as a defense under similar circumstances. . . . It is settled law that in prohibitive statutes covering misdemeanors, where no provision is made as to intention, and the word 'knowingly' or other apt words are not employed to indicate that knowledge is the essential element of the crime, intention is not an element of the crime"

In the present case the problem was one of constitutionality rather than statutory construction, but in my opinion the principle of law expressed by the *Striggles* case applies both when the problem is one of statutory construction and when the problem is one of constitutionality. The effect of a change in statutory construction has been presented to the Pennsylvania courts and the principle of law involved in a change of construction has been stated by the Pennsylvania Supreme and Superior Courts to be: (*Buradus v. Gen. Cement Prod. Co.*, 159 Pa. Sup. Ct. 501, 504, aff'd. 356 Pa. 349).

"In general the construction placed upon a statute by the courts becomes a part of the act from the very beginning. And when former decisions are overruled, the reconsidered pronouncement becomes the law of the statute from the date of its enactment."

It should be pointed out that the defendant did not take the stand and that he presented no evidence in the

1. There are statements to the same effect in other Pennsylvania cases. See *Phila. v. Schaller*, 148 Pa. Sup. Ct. 276, 280. *Menge v. Phila.*, 36 D. & C. 352, 354. But this all-inclusive statement apparently is not the law in all the states. See *Retrospective Operation of Overruling Decisions*, 35 Ill. L. R. 121.

present case. There is nothing to indicate that he was in any way misled by Judge Welsh's decision or that he even knew of it, or that he would have paid the tax but for Judge Welsh's decision.

It should be emphasized that since the word "willful" was not used in the information defendant has been indicted and found guilty under Section 3294(a) of the statute by the terms of which knowledge and/or willfulness are of no significance in contrast to Section 3294(c) under which willfulness is an essential element of the crime. Cf. *United States v. Kahringer*, 210 F. 2d 565. (3rd Cir. 1954).

Defendant contends also that there is a variation between the information and the proof that he was charged with having "accepted" wagers while the proof showed that he "received" wagers. Defendant's reasoning is that since the section of the statute which refers to proprietors uses the word "accept" while the section of the statute which refers to employees uses the word "receive", an employee (not a proprietor) can be convicted properly only if he has been charged with having "received" wagers.

The United States Supreme Court has said in reference to the problem of variance in *Berger v. United States*, 295 U. S. 78, at page 82:

"The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense."

If the word "receive" had been substituted in the information for the word "accept" defendant would have no

argument at all on his contention of variance. The words "receive" and "accept" as they are used in referring to part of a gambling business are so close in meaning that in my opinion, for indictment purposes, the use of one rather than the other in the case is of no significance at this stage of the case, that is, after the trial and the verdict. I cannot see how the use of the one word rather than the other could have taken defendant by surprise or in any way could have interfered with his presentation of his defense. The evidence, read with the information, shows clearly of what the defendant was convicted. He is amply protected against another prosecution for the same offense. See *United States v. Richie*, 222 F. 2d 436 (3rd Cir. 1955). I disagree with defendant's contention that there was a variance between the information and the proof.

Accordingly, defendant's motions for judgment of acquittal and in the alternative for a new trial will be denied.

/s/ ALLAN K. GRIM, J.

JUDGMENT.

On this 16th day of January, 1956 came the attorney for the government and the defendant appeared in person and by counsel.

It Is ADJUDGED that the defendant has been convicted upon his plea of NOT GUILTY and a verdict of GUILTY of the offense of failure to pay special occupational tax on wagering (FILED JANUARY 16, 1956), as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It Is ADJUDGED that the defendant is guilty as charged and convicted.

It Is ADJUDGED that the defendant pay to the United States a fine of ONE THOUSAND DOLLARS (\$1,000.00).

(Seal)

s ALLAN K. GRIM,
Allan K. Grim,

United States District Judge.

DEPARTMENT
BURE

POLICE DEPARTMENT
PHILADELPHIA, PA.

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EXHIBIT G-2

In the case of Victor Calamaro vs. Commonwealth, arrested by
Officer Kelly of the 33rd. District, charged with Lottery
the case was disposed of, the defendant being found Guilty and sentenced to \$200.00 F & C.
in the _____ by Judge Griffith. The following articles held as evidence in
said case were Confiscated
by Asst. D. A. Crippins
Articles: 40-clips, 8-sheets

The above articles and merchandise were confiscated by
Crippins by order of the Court
ASSISTANT DISTRICT ATTORNEY

Judge Griffith
Officer Ed. Kelly 2792 33rd Police District.

CHIEF CLERK, POLICE DEPARTMENT

62a

In United States Court of Appeals
for the Third Circuit

No. 11846

UNITED STATES OF AMERICA

v.

VICTOR CALAMARO, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Argued May 24, 1956

Before McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges*

Opinion of the Court

(Filed July 11, 1956)

By HASTIE, Circuit Judge. The special occupational tax, recently imposed on gamblers by Section 471 (a) of the Revenue Act of 1951, 65 Stat. 531, and the attendant criminal sanctions are bringing bizarre problems to the national courts. Witness the present appeal, which turns on a question of job classification in the so-called numbers racket.

The legislative scheme makes a person, who engages in a type of gambling activity which is taxable under Section 3290
65 of Title 26 of the United States Code without having paid the tax, guilty of a crime under Section 3294 (a) of that Title. Such a conviction has led to this appeal.

The first question presented is whether the district court erred in not directing an acquittal on the ground that the proved conduct of the accused did not make him liable to the gambler's tax. In terms, Section 3290 imposes a special occupational tax not only on the entrepreneur "who is engaged in the business of accepting wagers" but also on one "who is engaged in receiving wagers for" such an entrepreneur.

The evidence revealed appellant Calamaro as a very minor functionary in the conduct of that illegal type of lottery called the numbers game. It is conceded that he is not "engaged in the business of accepting wagers" within the meaning of the statute.¹

¹ The correctness of this concession is indicated by the legislative history of the statute. Both Senate and House Reports on the bill state such a limitation on the concept of engaging in the business of accepting wagers.

"A person is considered to be in the business of accepting wagers if he is engaged as a principal who, in accepting wagers, does so on his own account. The 'principals'

But the court below thought Calamaro's activity, as proved, amounted to "receiving wagers" within the meaning of Section 3290. Whether that conclusion is correct must be decided in the light of what the record shows about the organization of this illegal business and the specific role played by appellant.

From the evidence we learn that an operating center for numbers play is called a "bank". Each day the written notations of the many "plays", showing how much each bettor has wagered and upon what number or numbers, are channeled into the bank for recordation and appropriate action. In due season the bank

also disburses sums won by the relatively few bettors upon
66 whose illegal chance-taking fortune has smiled. But

neither in placing his wager nor in collecting, if he wins, does the bettor visit the "bank" or establish direct contact with the headquarters operation. Rather, he places his wager with one of many scattered field operatives called "writers". We are told that the "writing" procedure is standardized in that the "writer" records each wager in triplicate on standard slips: one for the bettor, a duplicate to be retained by the writer, and a third or action copy, identified by its yellow color, for the bank.

But the writer does not come into personal contact with the bank any more than does the bettor. The "numbers banker", even as bankers and brokers in reputable commerce, employs salaried runners and messengers. These couriers are called "pick-up men." It is the duty of a pick-up man to make a daily round of writers, collect yellow slips from them and carry these items to the bank.

Calamaro was a salaried pick-up man. He was intercepted, apparently inbound on his appointed round, by an alert police officer and found to have on his person tell-tale numbers paraphernalia: to wit, notations of bets recorded on yellow slips, such as already have been described. His conduct became a matter of concern to the federal authorities upon discovery that he was going about his illegal work without having rendered unto Caesar any Section 3290 tribute. Whether that section applied to him as a pick-up man, is the present issue.

In normal usage of familiar language, "receiving wagers" is what someone on the "banking" side of gambling does in dealing with a bettor. Placing and receiving a wager are opposite sides

in such transactions are commonly referred to as 'bookmakers.' * * * H. R. Rep. No. 586, 1951, 82d Cong., 1st Sess. 1783, 1839; S. Rep. No. 781, Id., 1969, 2091.

This restrictive concept has been recognized and applied by the Court of Appeals for the Fourth Circuit in *Sagonias v. United States*, 1955, 223 F. 2d 146. On the other hand a general instruction, part of which seems to disregard this concept, was approved by the Court of Appeals for the First Circuit in *Daley v. United States*, 1956, 231 F. 2d 123. However, that case did not involve pick-up men or operatives in any analogous situation and it does not appear that the legislative history was brought to the court's attention.

of a single coin. You can't have one without the other.² Before the pick-up man enters the picture, in such a case as we have here, the wager has been received physically by the writer and, in legal contemplation, by the writer's principal as well.

67 The government recognizes—and in an appropriate case no doubt would insist—that what the writer does in relation to the bettor amounts to “receiving a wager.” Thus, the government has to argue that the wager is received a second time when the writer hands the yellow slip to the pick-up man. But we think this ignores the very real difference between a wager and a record of a wagering transaction. It is the banking record and not the wager which the pick-up man receives from the writer and transmits to the bank. The pick-up man no more receives wagers than a messenger, who carries records of customer transactions from a branch bank to a central office, receives deposits.

Recognizing this analytical difficulty, the government argues in generality that all who participate on the banking side of the numbers game may be viewed as receiving wagers. But this is an enlargement of the meaning of ordinary language used by Congress beyond ordinary usage and understanding. Certainly, such enlargement is not justified when the matter in issue is the scope of a statutory duty, compliance with which is enforced by a criminal sanction.

In reaching this conclusion we are aware that we are disagreeing with the United States Court of Appeals for the Fifth Circuit which, in *Sagonias v. United States*, 1955, 223 F. 2d 146, upheld the conviction of a pick-up man in a case indistinguishable from this one. Three sentences in the *Sagonias* opinion state its rationale:

“* * * [T]he primary purpose of the statute as a whole was to produce revenue by subjecting commercialized gambling to taxation. Its provisions clearly indicate that the special tax applies to the principal or proprietor and all persons who were knowingly engaged or used by him to receive wagers. While the express wording of Section 3290 does not include other employees directly involved in the operation, we think it would be inconsistent with the purpose of the statute to tax those who physically receive the wagers and exempt those whose duties were as important and as much a necessary part of the gambling operation.” 223 F. 2d at pp. 147-8.

If we assume that this judicial view of general statutory purpose is correct, to us it still does not seem to follow that language

² Among the definitions in the statute, one which is significant here defines “wager” as “any wager placed in a lottery conducted for profit.” 26 Stat. § 3285 (b) (1) (C).

which on its face merely imposes a tax on two categories of gambling personnel can properly be read as implying that all other categories of gambling personnel are also taxable. Ejusdem generis may be appropriate enough as a rule of limitation in construing a conjunctive coupling of specifics with a generality. But we can see no warrant for an enlargement of meaning ejusdem generis in a case like this where the legislature has used no general language to suggest that it was attempting to extend the tax beyond the enumerated categories of acceptors and receivers.

Finally, the Sagonias opinion also cites, as a make-weight, a statement in Section 325.41 of Regulation 132 promulgated November 3, 1951 by the Treasury Department. There the Department lists some examples of types of employment which in its view obligate the worker to pay this tax. One example is employment by an operator of a numbers game "to collect from his agents the wagers received on his behalf." But we think the statutory statement of taxable categories is not ambiguous and not comprehensive enough on its face to make the situation of a pick-up man an apt example of its coverage. To accept the Treasury view would be to add to the statute something which simply is not there.

We conclude that the district court should have granted appellant's motion for acquittal. We have not considered any of appellant's objections to other rulings of the trial court.

The judgment will be reversed.

69

McLaughlin, Circuit Judge, dissenting.

In its attempted delicate distinction which carefully removes appellant from the reach of the tax and, in effect, emasculates the statute, the majority ignores the realities of the case.

Admittedly appellant receives the ticket identifying the particular wager from which, according to the testimony, after the winning number has "come out" the bank determines whether it is obligated to pay that particular ticket. What more is needed to "receive a wager" does not appear from the court's decision. Further, instead of appellant being an inconsequential messenger, he is a direct representative of the "banker": a man from headquarters. Appellant stems directly from the "banker" to the "writers", an indispensable link in the day to day functioning of this vicious operation. With his class now exonerated everyone connected with "numbers" anywhere, if put to it, should have little difficulty avoiding the impact of Section 3290 by simply asserting that he is merely a "pick-up" man.

From the facts, appellant is a necessary and important participant in the ugly corroding racket involved. Not only is he

subject to that part of the law imposing liability on those persons "engaged in receiving wagers" (*Sagonias v. United States*, 223 F. 2d 146 (5 Cir. 1955)) but he also comes directly under it as one "engaged in the business of accepting wagers". That is the clear holding of *Daley v. United States*, 231 F. 2d 123, 128 (1 Cir. March 30, 1956). There, the court specifically affirmed that portion of the trial judge's charge which stated that,

"* * * to be 'engaged in the business of conducting a wagering pool or a lottery, a person does not have to personally receive money or a number pool or lottery bet from a bettor; if he is an active participant knowingly in an essential part of the management structure in the processing of such wagering pool or lottery bets in an existing wagering or lottery business, whether top manager, agent solicitor on the street, or an employee or associate of a communications center or central book-keeping agency of an organization which was engaged in accepting wagers, or conducting a wagering pool or a lottery, he is engaged in such business.'"

There are no reported decisions in accord with the majority view. I would affirm the judgment of the district court.

71 In United States Court of Appeals for the Third Circuit

No. 11846

UNITED STATES OF AMERICA

c.

VICTOR CALAMARO, APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN, KALODNER and HASTIE, Circuit Judges

Judgment

July 11, 1956

[File endorsement omitted.]

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed.

JULY 11, 1956.

72. [Clerk's certificate to foregoing transcript omitted in printing.]

73. Supreme Court of the United States

No. 304, October Term, 1956

Order allowing certiorari

Filed October 15, 1956

[Title omitted.]

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.